APPENDIX "A"

RENDERED: MARCH 21, 1975

COURT OF APPEALS OF KENTUCKY

FILE NO. 74-1157

RALPH STEPHENS ..... APPELLANT

VS:
APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE CASWELL P. LANE, JUDGE
INDICTMENT NO. 74-53

COMMONWEALTH OF KENTUCKY ..... APPELLEE

OPINION OF THE COURT BY JUSTICE JONES
AFFIRMING

Ralph Stephens was convicted on a charge of dwelling-house breaking. In conformity with the jury's verdict, Stephens was sentenced to 6 years in the state penitentiary.

The record on appeal has been certified to this court pursuant to an agreed statement. RCr 12.72. Stephens presents three questions for this court's consideration. First, he contends that the magistrate of District #2, Rowan County, Kentucky, had no authority to issue a search warrant from the Rowan Quarterly Court. There is no contrariety in the testimony presented on a hearing to suppress the evidence. It is admitted that Calvin R. Lytle, the

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magistrate of District #2, issued the search warrant about which Stephens complains. The search warrant was styled:

> "The Commonwealth of Kentucky
> In The Rowan Quarterly Court
> Of Morehead. Kentucky."

The search warrant described the location of the Ralph Stephens residence. It commanded the officer or officers to search the residence for various weapons, men's suits, and rare-type coins ranging from pennies to silver dollars. The search warrant closed with the following statement:

> "...and if you find same or any part thereof, to bring it forthwith before me or any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody subject to the order of such court.
>
> Witness my hand the 18th day of July, 1974.
>
> /s/ Calvin R. Lytle
> Magistrate District
> #2 Rowan Court County."
> Morehead, Kentucky

There is no merit in Stephens' contention that only the county judge of Rowan County, or under certain circumstances, the county judge pro tem of Rowan County, had the legal authority to issue a warrant from the Rowan Quarterly Court, *because we think the warrant was not in fact issued out of the Rowan Quarterly Court.* The warrant was issued by Lytle in his official capacity as a magistrate.

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> "A search warrant my be issued, upon affidavit sufficient under Sec. 10 of the Constitution of Kentucky and sworn to by the issuing officer by a *magistrate,* or by any other officer authorized by statute." RCr 13.10.

Lytle, after signing the warrant a magistrate of District #2, Rowan County, blocked out the word "Judge," with the letter "x." He did the same in the Jurat on the affidavit and signed it as Calvin R. Lytle, Magistrate, District #2, Rowan County, Kentucky. The failure of the magistrate to cross out the words, "In the Rowan Quarterly Court of Morehead, Kentucky," under the designation, "The Commonwealth of Kentucky," did not affect the validity of the warrant.

Next, Stephens attacks the qualifications of Lytle. He contends that the magistrate had no knowledge of the Fourth Amendment of the United States Constitution. He argues also that the magistrate did not understand the meaning of "probable cause." Lytle's testimony reveals that he read both the warrant and the supporting affidavit. He then determined that there was "reasonable cause" to issue the warrant.

Section 10 of the Kentucky Constitution and the Fourth Amendment to the Federal Constitution are practically the same in guaranteeing citizens freedom in their persons, houses, papers and possessions against unreasonable searches and seizures. They each provide that no warrant shall issue for a search except probable cause supported by affidavit.

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It is true that Lytle had not read recent Supreme Court cases dealing with search warrants. He had not committed to memory the Fourth Amendment of the United States Constitution. It is doubtful that he could have recited the Ten Commandments in proper sequence. If these were prerequisites to the qualification of a judicial officer to issue a warrant, the whole process of criminal justice would require restructuring. Magistrate Lytle is a constitutional officer. Sec. 142 Kentucky Constitution. He is authorized to issue search warrants. Magistrate Lytle did not possess a "judicial mind" such as did the eminent jurists Learned Hand and Oliver W. Holmes. However, the evidence convinces this court that he knew what constituted probable cause sufficient for the issual of the warrant.

Finally Stephens attacks the sufficiency of the search warrant because it did not describe the ladies' watch and the two rings admitted in evidence. The search warrant described with particularity that "coins ranging from pennies to silver dollars" had been taken from the house of Les Branham. In obedience to the command of the warrant, the officer took a metal box that was concealed in a hole in the wall. It was not likely that pennies or silver dollars would be laid end to end on a rafter. The most likely place for the containment of coins, watches, rings. and knives would be a metal box. The box contained two rings and a ladies' watch which belonged to Branham. He did not identify the coins as those taken from him. Although the watch and rings were not specified in the search warrant, they were identified as items that had been stolen

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from the Branham home. Their seizure and introduction into evidence was legal.

> ". . . While engaged in a legitimate search under a search warrant describing specific articles, it is proper to seize stolen or contraband property, or property constituting the fruits of the crime or instrumentalities of the crime, though the latter are not described in the warrant." *Jones* v. *Commonwealth,* Ky., 416 S.W.2d 342 (1967).

The metal box, nestled among the cobwebs in the rafters, contained: 27 men's wrist watches, 38 ladies' wrist watches, 7 pocket knives, 7 men's rings, 22 ladies' rings, 6 gold chains, 5 watch bands, 1 gold belt buckle, and various other items. The officer who conducted the search testified:

> "Q. Can you point to one single item that made you think that it was taken from the Branham residence, other than the fact it was concealed?
>
> A. That . . . the fact that it was concealed, there were watches in there, there were knives in there, I knew that there had been some watches taken, I believe there had been some knives taken also from the Branham home, and that was the reason we was there, to look for those items stolen from his home."

A review of the record before this court shows:

1. That Calvin R. Lytle, as magistrate of the 2nd

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Magisterial District, issued the warrant in his official capacity as magistrate. He was not acting as judge of the Rowan Quarterly Court.

2. That Magistrate Lytle was qualified to issue the search warrant.

3. That the two rings and the watch belonging to Branham and seized as a result of the search warrant were properly admitted in evidence.

The judgement is affirmed.

All concur.

ATTORNEY FOR APPELLANT:

LEWIS A. WHITE
WHITE & PECK
P. O. Box 304
Mt. Sterling, Kentucky 40353

ATTORNEYS FOR APPELLEE:

ED W. HANCOCK,
Attorney General

VICTOR FOX,
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

APPENDIX "B"

MANDATE

THE COMMONWEALTH OF KENTUCKY,

THE COURT OF APPEALS

75 TERM—MARCH 21, 1975

RALPH STEPHENS ..... APPELLANT

VS:

APPEAL FROM A JUDGMENT OF THE MONTGOMERY CIRCUIT COURT INDICTMENT 74-53, FILE NO. 74-1157

COMMONWEALTH OF KENTUCKY ..... APPELLEE

The Court being sufficiently advised, it seems there is no error in the judgement herein.

It is therefore considered that said judgement be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A COPY—Attest:

/s/ Frances Jones Mills, C.C.A.
FRANCES JONES MILLS, C.C.A.
By _____, D. C.

ISSUED MAY 23, 1975
APPELLANT'S PETITION FOR REHEARING DENIED—5/23/75

APPENDIX C

MONTGOMERY CIRCUIT COURT
21ST JUDICIAL DISTRICT

COMMONWEALTH OF KENTUCKY ..... PLAINTIFF

VS:

INDICTMENT NO. 74-53
INDICTMENT
KRS 433.180
(2-10) ( )

RALPH STEPHENS (Stevens) ..... DEFENDANT

The Grand Jury charges:

BREAKING AND ENTERING

On or about the 6 day of April 1974 in Montgomery County, Kentucky, the above-named defendant, feloniously broke and entered the dwelling house of Les Branham with the intent to steal therefrom, against the peace and dignity of the Commonwealth of Kentucky.

WITNESSES: Les Branham
Det. Babe Howard
Mivory Spencer

A TRUE BILL
/s/ Thos. P. Sutton
Foreman

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MONTGOMERY CIRCUIT COURT
INDICTMENT NO. 74-53

COMMONWEALTH OF KENTUCY ..... PLAINTIFF

VS: MOTION TO SUPPRESS EVIDENCE

RALPH STEPHENS ..... DEFENDANT

1. The defendant Ralph Stephens moves the Court to suppress as evidence all items seized under a search warrant dated July 18, 1974 issuing from the Rowan Quarterly Court and signed by Calvin R. Lytle, identified as Magistrate, District No. 2, Rowan County for the following reasons:

2. Calvin R. Lytle, as Magistrate, District No. 2, Rowan County, had to authority to issue the search warrant.

3. The affidavit filed with the search warrant is insufficient to establish probable cause for the issuance of such warrant.

4. Articles seized from the residence of the defendant were not those enumerated in the search warrant.

5. The location of the residence and premises described in the search warrant were not within Magistrate District No. 2, Rowan County.

WHITE AND PECK
Attorneys at Law
Mt. Sterling, Kentucky
ATTORNEYS FOR DEFENDANT

Lewis A. White
By: _____

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THE COMMONWEALTH OF KENTUCKY
IN THE ROWAN QUARTERLY COURT
OF MOREHEAD, KENTUCKY

SEARCH WARRANT

To any policeman, sheriff, constable or other peace officer of the Commonwealth of Kentucky:

Proof by affidavit having this day been made before me by DET. BABE HOWARD Commonwealth of Kentucky, Bureau of State Police, a peace officer of Commonwealth of Kentucky, Bureau of S. that there is probable and reasonable cause for the issuance of this search warrant as set forth in the affidavit attached hereto and made a part hereof as if fully set out herein; you are commanded to make immediate search of the premises known and numbered as RALPH STEPHENS residence, Bull Fork, Rowan County, Kentucky, and more particularly described as follows: Beginning at the intersection of Kentucky Highway #32 and the Bull Fork Road, travel South on the said Bull Fork Road for a distance of 2.3 miles South to a white frame dwelling house with a green metal roof and a front porch. Said dwelling house is on the right side of the said Bull Fork Road and used by RALPH STEPHENS as a residence. Said dwelling house is situated in Rowan County, Kentucky, approximately seven (7) miles from Morehead, Kentucky.

and/or (a) vehicles (s) described as a gold colored 1971 Buick 2-door bearing 1974 Kentucky license 835-888.

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and/or the person(s) of RALPH STEPHENS or such other person or persons who may appear to be in control of the within described premises and automobile.

for the following personal property, to wit: One 400 lb. floor safe, brand unknown, one muzzle loading rifle, one Westfield .20 ga. pump shotgun, one Golden Spike Winchester .30.30 rifle, one .22 cal. Winchester magnum rifle, one Mossenburg and Sons .12 ga. single barrel lever action shotgun, one Hopkins and Allen .12 ga. single barrel shotgun, one Little Scout .22 cal. rifle, one Springfield .22 cal. rifle, one Marlin .22 cal. rifle, one Smith & Wesson .357 magnum revolver, serial #8049, one Smith & Wesson .38 cal. snub-nose revolver, serial #J57403, six men's suits, assorted colors and sizes, rare type coins ranging from pennies to silver dollars.

and if you find same or any part thereof, to bring it forthwith before me or any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody subject to the order of such court.

Witness my hand the 18th day of July, 1974.

/s/ Calvin R. Lytle

Judge, Magistrate District No. 2,
Rowan Court County,
Morehead, Kentucky

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Executed this 18 day of July, 1974, by searching the within named premises, including the within named automobile. Several burglarious tools were found in the front and rear of said automobile, and seized.

/s/ C. A. Thomas

DET. SGT. C. A. THOMAS, KSP

APPENDIX F

MONTGOMERY CIRCUIT COURT
INDICTMENT NO. 74-53

RALPH STEPHENS ..... APPELLANT

VS:
AGREED STATEMENT PURSUANT TO RCr. 12.72

COMMONWEALTH OF KENTUCKY ..... APPELLEE

* * * *

Appellant Ralph Stephens was indicted in the Montgomery Circuit Court (Indictment No. 74-53, Exhibit #1) charged with feloniously breaking and entering the dwelling house of Les Branham with the intent to steal therefrom. A jury trial in the Montgomery Circuit Court held October 7, 1974 resulted in a verdict of guilty and punishment was fixed at confinement in the penitentiary for a period of six years. (Exhibit #6).

On October 8, 1974 the appellant filed and served a motion and grounds for a new trial (Exhibit #7) and on October 24, 1974 the court overruled appellant's motion and grounds for a new trial and entered judgment against the appellant pursuant to the jury verdict. (Exhibit #8). The appellant was permitted to remain on bail pending appeal.

On October 31, 1974 appellant filed his notice of appeal in the Montgomery Circuit Court (Exhibit #9).

After indictment but prior to trial and on October 1,

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1974, appellant filed a motion to suppress as evidence (Exhibit #4) articles seized under a search warrant dated July 18, 1974 issuing from the Rowan Quarterly Court and signed by Calvin R. Lytle, identified as Magistrate, District No. 2, Rowan County (Exhibit #2)

A hearing upon this motion to suppress was held on October 4, 1974. At this hearing there was introduced the testimony of Calvin R. Lytle, Magistrate, District No. 2, Rowan County, Kentucky, Clyde Thomas, a detective sergeant with the Kentucky State Police, Alonzo Hensley, a detective sergeant with the Kentucky State Police and Babe Howard, another detective sergeant with the Kentucky State Police. (Exhibit #5)

The following facts were established by the testimony introduced at this hearing:

On July 18, 1974, the date when he signed the search warrant (Exhibit #2) and signed the jurat to the affidavit of Babe Howard upon which the search warrant was issued (Exhibit #3), Calvin R. Lytle was the duly elected, qualified and acting Magistrate for Magistrate District No. 2, Rowan County, Kentucky, but was not at that time or any other time the Judge of Rowan County, Kentucky or presiding judge of the Rowan Quarterly Court.

Magistrate Lytle was and is a merchant by occupation and is not an attorney.

A number of articles were seized from the residence of the appellant pursuant to the search warrant which were not listed on the search warrant and of these articles a

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ladies wrist watch and two ladies rings were identified by Les Branham at the trial as having been taken from his residence. No property listed on the search warrant and affidavit for the search warrant as stolen property was found in appellant's home or seized pursuant to the search warrant.

When this case was called for trial on October 7, 1974, the trial court overruled appellant's motion to suppress the evidence seized under the search warrant of July 18, 1974 and upon the trial of the case permitted over appellant's objection the introduction into evidence of the ladies wrist watch and two rings seized under the search warrant and identified by Les Branham as having been taken from his residence.

Without the introduction into evidence of the ladies wrist watch and two rings seized under the search warrant the appellant would have been entitled to a directed verdict since no other proof was introduced connecting him with the offence alleged in the indictment.

It is the position of the appellant upon this appeal that the trial court erred in overruling his motion to suppress the evidence seized under the search warrant issued from the Rowan Quarterly Court dated July 18, 1974 (Exhibit #2) because (1) Calvin R. Lytle as Magistrate, District No. 2, Rowan County, Kentucky, had no legal authority to sign or issue the search warrant, (2) nor, not being an attorney, was he qualified to do so, and (3) further the court erred in permitting the introduction into evidence of the watch and two rings seized pursuant to the search

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warrant since they were not described or mentioned in the search warrant and none of the articles listed in the search warrant as alleged stolen property was found in appellant's residence or seized under the search warrant.

To submit this issue on appeal there are attached the following exhibits, which together with this statement shall constitute the record to be certified to the Court of Appeals of Kentucky in this appeal:

Exhibit #1, Indictment No. 74-53, Montgomery Circuit Court

Exhibit #2, Search warrant dated July 18, 1974 issued from the Rowan Quarterly Court and signed by Calvin R. Lytle, Magistrate, District No. 2, Rowan County.

Exhibit #3, Affidavit in Support of search warrant dated July 18, 1973 signed by Babe Howard and sworn to before Magistrate Calvin R. Lytle.

Exhibit #4, Motion to suppress evidence.

Exhibit #5, Transcript of evidence heard at suppression hearing.

Exhibit #6, Jury verdict.

Exhibit #7, Motion and Grounds for a New Trial.

Exhibit #8, Judgment dated October 24, 1974.

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Exhibit #9, Notice of Appeal filed October 31, 1974. This November 15, 1974.

WHITE AND PECK
Attorneys at Law
Mt. Sterling, Kentucky

ATTORNEYS FOR APPELLANT

/s/ Lewis A. White
By: _____

/s/ James E. Clay
JAMES E. CLAY
Commonwealth's Attorney
21st Judicial District

Attorney for Appellee

The foregoing Agreed Statement Pursuant to RCr. 12.72 is approved by the Court and hereby certified to the Court of Appeals as the record on appeal.

This November 15, 1974.

/s/ Caswell P. Lane
Judge, Montgomery Circuit Court

/s/ Paula Duncan
Clerk, Montgomery Circuit Court

APPENDIX G

MONTGOMERY CIRCUIT COURT
MT. STERLING, KENTUCKY,
OCTOBER 24, 1974

COMMONWEALTH OF KENTUCKY ... PLAINTIFF

VS:

JUDGMENT
ON INDICTMENT NO.(s): 74-53
ON THE CHARGE(s) of:

RALPH STEPHENS ... DEFENDANT

This 24th day of October, 1974, the defendant Ralph Stephens appeared in open court with his attorney, Lewis A. White, and Neil R. Maxey appeared as attorney for the Commonwealth, the court informed the defendant that he has been found guilty of the crime of breaking and entering by (the court) (a jury) on his plea of (not) guilty, the court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and no sufficient cause was shown why judgment should not be pronounced, and it is therefore by the court: ADJUDGED that the defendant is guilty of the crime of breaking and entering and his punishment is fixed at confinement in the State Penitentiary for a period of six years at hard labor; and it is FURTHER ORDERED AND ADJUDGED that the County Sheriff shall deliver the defend-

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ant to the custody of the Department of Corrections hereunder at such location within this state as the Department shall designate.

After fixing sentence, the court informed the defendant of his right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, and of his right to a free appeal, including free counsel and free transcript if he could not afford same. Pending appeal bail is continued.

/s/ Caswell P. Lane
Circuit Judge
Montgomery Circuit Court

Attested as a true copy of Judgment entered on the 24th day of October, 1974, in Order Book 15, page 557, and signed by

CASWELL P. LANE
Circuit Judge
/s/ Paula Duncan
Clerk

APPENDIX H

MONTGOMERY QUARTERLY COURT

COMMONWEALTH OF KENTUCKY ..... PLAINTIFF

VS: WARRANT OF ARREST ON COMPLAINT

RALPH STEPHENS ..... DEFENDANT

TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY:

You are hereby commanded to arrest Ralph Stephens and bring him forthwith before the Judge of the Quarterly Court of Montgomery County, Kentucky (or, if he be absent or unable to act, before the nearest available magistrate), to answer a complaint made by Babe Howard Charging him with the offense of housebreaking.

Issued at Mt. Sterling, Montgomery County, Kentucky, this 23rd day of July, 1974.

/s/ Harry G. Hoffman II
Judge, Montgomery
Quarterly Court

By; _____ Clerk

The defendant may be admitted to bail in the sum of $10,000.00 this 23rd day of July, 1974.

/s/ Harry G. Hoffman II
Judge, Mongomery
Quarterly Court

By; _____ Clerk

APPENDIX I

COURT OF APPEALS OF KENTUCKY
FILE NO. 74-1157

RALPH STEPHENS ..... **APPELLANT**

VS:
APPEAL FROM MONTGOMERY CIRCUIT COURT
HON. CASWELL P. LANE, JUDGE

COMMONWEALTH OF KENTUCKY ..... **APPELLEE**

ADMISSION OF ERROR

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTION PRESENTED

DID CALVIN R. LYTLE, MAGISTRATE, DISTRICT NO. 2, ROWAN COUNTY, KENTUCKY, HAVE AUTHORITY TO ISSUE A SEARCH WARRANT FROM THE ROWAN QUARTERLY COURT?

STATMENT OF THE CASE

This appeal was submitted upon agreed statement pursuant to RCr 12.72.

ARGUMENT

Appellee is constrained to concede error and admits that a magistrate, as defined by RCr 1.06 cannot perform judicial functions except in the court presided over by him.

Since the Commonwealth confesses error in the is-

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suance of the search warrant, the other questions raised by appellant are, appellee submits, moot.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL

/s/ Victor Fox
VICTOR FOX
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

JAMES E. CLAY
COMMONWEALTH'S ATTORNEY
21st JUDICIAL DISTRICT

COUNSEL FOR APPELLEE